

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:MSR:AOK:OKL:TL-N-2494-00
ORLatrobe

date: April 26, 2000

to: Chief, Examination Branch II, Arkansas-Oklahoma District
Attn: Acting Case Manager Christie Fincher

from: District Counsel, Arkansas-Oklahoma District, Oklahoma City

subject: Request for Advisory Opinion

Taxpayer: [REDACTED]

TIN: [REDACTED]

Taxable Years: [REDACTED] and [REDACTED]

This is in reply to your memorandum dated April 24, 2000, requesting our advice as to the application of I.R.C. § 1313 (a)(3) to the above case.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

Review Procedure

It must be noted that our procedures require that our advice be post-reviewed by the National Office and that we advise your office not to take any action based upon this memorandum until we receive notice that it has been approved.

Our construction of your request is that it is limited to the narrow question of whether I.R.C. § 1313 (a)(3) would apply in this case, if the proposed refund claim is granted. It is our understanding that your office is not requesting advice as to whether, or how, the mitigation provisions under § 1311, et seq. would apply.

ISSUE:

Whether I.R.C. § 1313 (a)(3) is applicable in the above case.

FACTS:

The limited facts in this case are as follows. The taxpayer has recently claimed a refund for the taxable year [REDACTED] with respect to the application of the mark-to-market rules. The [REDACTED] year is open under the statute of limitations.

Before electing to use the mark-to-market rules, the taxpayer had claimed deductions in the year [REDACTED] for the same loss deductions that are now being applied to [REDACTED]. The [REDACTED] year, however, does not have an open statute of limitations.

The Examination Division is in agreement that the losses should be allowable in [REDACTED] under the mark-to-market rules. It is desired to structure the resolution of the issue so that the allowance of a refund in [REDACTED] will produce a correlative deficiency in [REDACTED], for the deductions already taken.

DISCUSSION:

Your inquiry addresses the question of when a "determination" has been made under I.R.C. § 1313, such as would satisfy one of the criteria for application of the mitigation rules under I.R.C. § 1311 et seq. Based upon the information provided to us, it is our opinion that the allowance of the refund for the year [REDACTED] would constitute a "determination" for the purposes of I.R.C. § 1313. The operative language which provides such conclusion is provided in I.R.C. § 1313 itself:

(a) Determination

For purposes of this part, the term "determination" means-

- (1) a decision by the Tax Court...;
- (2) a closing agreement...;

(3) a final disposition by the Secretary of a claim for refund. For purposes of this part, a claim for refund shall be deemed finally disposed of by the Secretary-

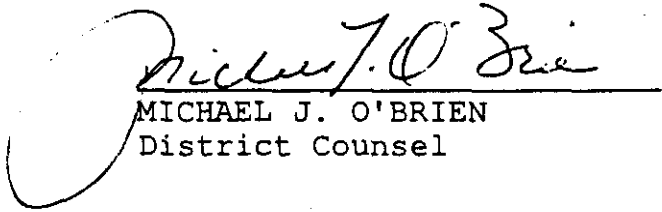
(A) as to items with respect to which the claim was allowed, on the date of allowance of refund or credit or on the date of mailing notice of disallowance....

Emphasis added

Since, it is our understanding, the claim as to [REDACTED] is to be allowed, it would follow that there would be a final determination of that claim, under this section, on the date that the refund claim is allowed.

We would note that, although such a disposition is just as effective a "determination" for the purposes of § 1313 as a closing agreement, it does not have the same effectiveness in committing the taxpayer to a correlative result in [REDACTED]. If such a procedure is chosen, it may be advisable to at least get the taxpayer to sign a letter agreement stating its acceptance of the [REDACTED] result based upon the [REDACTED] concession by the government. While not necessarily legally binding, such an informal agreement is generally effective in morally binding an otherwise conscientious taxpayer, and may serve as a basis for an estoppel argument.

If you have any further questions with respect to the above, please feel free to contact Mr. Osmun Latrobe of this office at 405-297-4815.



MICHAEL J. O'BRIEN
District Counsel

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CC:DOM:FS